ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE TELEPHONE OPERATING COMPANIES	)	
Tariff F.C.C. No. 1	)	**Transmittal Nos. 873, 893**
	)	
Video Channel Service at	)	**CC Docket No. 94-81**
Cerritos, California	)	

To: The Commission

DOCKET FILE COPY ORIGINAL

RECEIVED
OCT - 3 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR LEAVE TO FILE
REPLY COMMENTS, TIME HAVING EXPIRED

Apollo CableVision, Inc. ("Apollo"), by its attorneys, respectfully requests leave to file the "Reply Comments on Behalf of Apollo CableVision, Inc.", tendered simultaneously herewith. In support of this request, the following is submitted:

Paragraph 37 of the Common Carrier Bureau's Order of July 14, 1994, herein provided that parties desiring to do so could file reply comments directed to others' September 15 comments, on or before Friday, September 30. Apollo's counsel prepared and dispatched Apollo's reply comments by messenger late in the day Friday for filing with the Commission. Because the messenger did not arrive at the Commission's offices until approximately 5:35 p.m., however, the Secretary's office was closed and the pleading could not be accepted.

The Washington office of Apollo's counsel began last week a conversion of its word processing system from a DOS environment to a Windows-based platform. Regrettably, the production of Apollo's pleading became enmeshed in the glitches that the initial implementation of such a new system appears to entail, such that by mid-day Friday, the virtually-completed document could neither be

extricated from the system nor accelerated in its production. Even with the best efforts of able support staff and programmers, Apollo's counsel was unable to meet the 5:30 deadline, for word processing reasons seemingly beyond anyone's control.

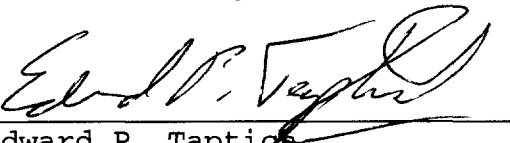
No party will be prejudiced by a grant of this request. As the Certificate of Service attached to the pleading confirms, mail service on all parties was effected on Friday. In addition, hand delivery of copies of the document to the responsible Bureau personnel is being made today, along with the tendering of the document itself.

Finally, Apollo has a direct and vital interest in the outcome of this proceeding. Fundamental equities support an acceptance and consideration of Apollo's views on the substantive issues involved.

Accordingly, Apollo respectfully requests that its Reply Comments, lodged simultaneously herewith, be accepted and considered in the Bureau's deliberations.

Respectfully submitted,

APOLLO CABLEVISION, INC.

By: 

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Its Attorneys

October 3, 1994

CERTIFICATE OF SERVICE

I, Roberta Schrock, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 3rd day of October, 1994, caused a copy of the foregoing document to be served on the following by first-class U.S. mail, postage prepaid:

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* Hand delivered.

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GTE TELEPHONE OPERATING COMPANIES Tariff F.C.C. No. 1	)	Transmittal Nos. 873, 893
Video Channel Service at Cerritos, California	)	CC Docket No. 94-81

To: The Commission

REPLY COMMENTS
ON BEHALF OF
APOLLO CABLEVISION, INC.

APOLLO CABLEVISION, INC.

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SUMMARY

Aside from categorical assertions that the Armour Packing decision compels an approval of Transmittal No. 873 as filed, GTE Telephone's Comments offer nothing new on the issue of whether the carrier may summarily abrogate its long-term contracts with Apollo. Absent is any further explanation why, in light of Commission decisions creating and applying the "substantial cause" test to tariffs proposing to alter long-term carrier/customer service arrangements, the Sierra-Mobile principle does not require rejection of the tariffs here. The discussion of those precedents in Apollo's September 15 Opposition remains dispositive.

What is new is GTE Telephone's effort to contest any Apollo contract right to use of the GTE Service bandwidth -- a right with which the entire notion of Transmittal No. 873 would be inconsistent. What the carrier offers as supporting "facts," however, appear more to be "myths." Suggestions that Apollo knew of 15-year lease arrangements for GTE Service, and that the parties did not expect Apollo to accede to the remaining channels after GTE Services experimentation, fly in the face of all principals' discussions at the time, and are contradicted by the carrier's own written communications. The pleading's effort to negate the effect of pertinent agreement wording by resort to inapplicable common-law contract principles is equally contrived.

When all of the rhetorical dust settles, what remains is that Apollo's agreement with the carrier afforded it the right, when GTE Telephone notified Apollo of its "availability," to acquire use of the bandwidth GTE Service had employed in its experimentation, at "then reasonable market rent." In 1993, the

carrier gave Apollo an "availability" notification, and Apollo confirmed its intention to use the bandwidth. That GTE Telephone thereafter withdrew from efforts to ascertain a "then reasonable market rent" figure did not defeat Apollo's right. And the tariff structure here -- restricting Apollo to its current channels and installing GTE Service indefinitely on the remainder -- is patently inconsistent with the parties' agreements. The carrier's exaggerated efforts to resist these facts serve only to confirm their vitality.

GTE Telephone's Comments fail also to dispel the reality of operational problems and business injury to Apollo as a result of the artificial division of the unitary Cerritos cable system. While long on hyperbole, the Comments do not basically contest that GTE Telephone's attempt to establish two independent, competing service providers on the Cerritos 78-channel cable system have destroyed the security of Apollo's proprietary customer information, and have seriously impaired billing and other service functions.

Finally, the Comments confirm that there are indeed numerous significant differences between the terms of the proposed tariff and the parties' contract terms -- for none of which any "substantial cause" showing has even been attempted by the carrier. Transmittal No. 873 cannot meet the statutory just and reasonable standard based on the record to date, and rejection is required.

Before The
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To: The Commission

REPLY COMMENTS
ON BEHALF OF
APOLLO CABLEVISION, INC.

Apollo CableVision, Inc. ("Apollo"), by its attorneys, submits herewith its reply to the "Comments of GTE," filed herein September 15, 1994.

PRELIMINARY STATEMENT

With respect to Legal Issue 2, GTE Telephone's Comments add little by way of argument on the lawfulness of the carrier's proposal to abrogate the parties' long-term Lease Agreement (which the carrier asserts is statutorily required) and their Maintenance Agreement (as to which the carrier makes no such argument). Repeated is GTE Telephone's position that Armour Packing affords essentially unreviewable carrier discretion to fashion tariff provisions irrespective of long-term service arrangements with customers. But ignored are both Sierra-Mobile principles and Commission precedents compelling a contrary conclusion.

What GTE Telephone does add is an array of factual assertions intended to challenge Apollo's good faith, and to trivialize the impact on Apollo of the carrier's unilateral change in the parties' underlying business relationship. Recognizing that a permanent division by tariff of this unitary 78-channel cable system is at odds with its initial inducements to Apollo, GTE Telephone simply tries to rewrite history. It asserts GTE Service's indefinite operation is what everyone had in mind, and that Apollo's expectation to accede to use of GTE Service's bandwidth at the end of only a five-year period of experimentation is merely delusion.

To assertions that an unnatural halving of a 78-channel system for two separate entities is creating operational problems -- with resultant injury to Apollo's business and inconvenience to Cerritos subscribers -- GTE Telephone's response is much the same: Apollo's imagining things. The system was intended to be divisible, the carrier maintains, and installing GTE Service as a new competitor on half of the channels isn't really creating any operational problems.

In the pages which follow, Apollo addresses the carrier's assertions in detail. What is important to recognize at the outset, however, is the regrettable license GTE Telephone has taken with the facts. In some instances, unsworn assertions of carrier intentions directly conflict with earlier carrier documents, or with the content of carrier principals' discussions with Apollo. In others, vituperative characterizations of Apollo's arguments and operational activities are gratuitous and inaccurate. And in all, it appears GTE Telephone believes the Staff is prepared to accept

virtually any basis for brushing Apollo's contract entitlements, and its investment, aside.

ARGUMENT

I. GTE Telephone's Legal Arguments Remain Flawed

A. Armour Packing Does Not Support The Carrier's Position

In its Comments, GTE Telephone contends once more that under Armour Packing Co. v. United States, 209 U.S. 56 (1908), the proposed tariffs "control and are lawful," regardless of whether the tariff terms "differ from those of the supplanted contracts." (GTE Comments, p. 6.) Without any discussion of Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984),[1/] which the carrier itself

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[1/] See, e.g., id., 738 F.2d at 1316-18:

> [C]urrent law no longer considers contract rates to be per se violations of the common carrier duty of nondiscrimination . . . .
>
> The uncertain legal status of private contracts prior to 1978 stemmed largely from the ambiguity of the Supreme Court's holding in Armour Packing . . . .
>
> In light of . . . intervening developments, we find the inference unjustified that the Supreme Court in Armour Packing intended to condemn contract rates as inherently discriminatory. . . . Armour Packing properly read provides no support for the proposition that contract rates approved under appropriate Commission procedures inherently conflict with a common carrier's duty of nondiscrimination.

As pointed out in Apollo's August 15, 1994 Brief herein (p. 19), the Sea-land ruling has since been embraced both by the Commission, Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd. 5880 (1991) (at 5902-03) & accompanying notes), and by courts addressing Communications Act issues, e.g., MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990).

earlier acknowledged to be a problem for its theory (Direct Case, n.15), GTE Telephone aggressively urges that Armour Packing remains viable and applicable here, dismissing Apollo's contrary view as "a sign of desperation." (GTE Comments, p. 6).

The carrier's position is essentially a repetition of its Direct Case position on the point. Apollo's discussion of the relevance of Armour packing at pages 10-13 of its September 15, 1994 Opposition to Direct Case herein remains dispositive. As there shown, the carrier's mechanistic interpretation of Armour Packing to render any carrier/customer contracts "statutorily impermissible," thus clearing the way for anything the carrier would like to do by way of tariff, is simply untenable.

In a glacial increment, GTE Telephone here adds that, even if a tariff incorporating the terms of a carrier/customer arrangement "is not per se lawful" under Armour Packing, "Apollo's argument presents a factual scenario [necessary to apply Sierra-Mobile] which is not presently before the Commission" (GTE Comments, p. 8). The carrier then proceeds to make up distinguishing factors:

> (1) The tariff here alters the GTE Telephone/Apollo contracts since they "cannot be embodied in their entirety . . . in the filed tariff";
>
> (2) Because Apollo "consistently refused" to discuss tariff terms prior to their filing, the rates in Transmittal No. 873 are not "negotiated" rates; and
>
> (3) Even if Apollo had "negotiated in good faith," the parties would still have been bound by Sections 61.38 and 63.54 of the Commission's Rules.

(GTE Comments, p. 9.) The carrier's assertions are without merit, and in part strain the bounds of appropriate advocacy.

On the first point, the carrier's having chosen here to depart from the agreements in Transmittal No. 873 is inconsequential to the appropriate application of Sierra-Mobile principles. Indeed, those principles are specifically intended to test the propriety of such changes. And while the carrier asserts that the "entirety" of its contracts with Apollo "cannot" be reflected in its proposed tariff, it makes no effort either (a) to identify which elements "cannot" be tariffed, or (b) which terms it has simply chosen to omit or change in the tariff. Meaningful specific response is therefore not possible.

Concerning the second and third points, GTE Telephone's loose pleading charges of bad faith and refusals to negotiate on Apollo's part are highly regrettable. Should witness-and-cross-examination hearings be held, the true character of dealings among the carrier, GTE Service and Apollo will be made clear from those with knowledge of the facts. And the facts would show an entirely different picture of dealings -- one in which a major telecommunications carrier has unconscionably manipulated and muscled a smaller partner, and arrogantly sought to dictate business terms, all in the interest of advancing cable ambitions elsewhere than in Cerritos, California. Suffice it to say here, these defective tariffs are not the product of Apollo's lack of consultation.

As to its third point, while GTE Telephone suggests that the tariff differences are attributable in part to Section 61.38 of the Rules, on its face that citation does not explain any of the non-rate changes worked by Transmittal No. 873. Similarly, there is no carrier explanation of the coercive requirements of Section 63.54 of the Rules which are deemed to have dictated the proposed changes

to the parties' contract terms; nor does the carrier explain the inconsistency of its Rule reference with the carrier's earlier arguments concerning Section 63.54 (see, e.g., Direct Case, pp. 16-19).

In all, GTE Telephone fails once more to support its position that Armour Packing grants it unfettered discretion to alter earlier long-term carrier/customer agreements in whatever fashion it pleases in a new tariff proposal. Neither has the carrier here disputed that the Sierra-Mobile principles require, as a minimum, that GTE Telephone justify any discretionary changes to earlier agreement terms in the tariff proposed. Apollo renews its position on those matters, as expressed at pages 3-17 of its September 15, 1994 Opposition to Direct Case herein.

B. GTE Telephone Concedes Its Failure To Make Any "Substantial Cause" Showing

In its Brief (pp. 19-21), Apollo noted the Commission's requirement that, where proposed tariff provisions would alter the terms of long-term carrier/customer arrangements, sponsoring carriers must make a "showing of substantial cause" to support those revisions. Since GTE Telephone itself had acknowledged that Transmittal No. 873 worked substantial changes in the parties' earlier long-term contracts[2/] -- a recognition repeated in the carrier's Comments[3/] -- Apollo argued that GTE Telephone had not

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[2/] E.g., Direct Case at pp. 37-38.

[3/] E.g., GTE Comments, p. 12 ("certain provisions of the tariff differ from the contractual terms").

even attempted such a showing here, and that rejection was required for that reason alone.

In its Comments (pp. 10-12), GTE Telephone once more argues that the "substantial cause" test is inapplicable here. Stripped of all irrelevancies, the carrier's position remains two-fold:

> (1) "The Commission has never applied the substantial cause test to contractual relationships, only to long-term service tariffs." (GTE Comments, p. 10.)
>
> (2) Alternatively, "substantial cause" is self-evident because the filing of tariffs is necessary "to bring the parties into compliance with the [Communications] Act and the Commission's Rules." (GTE Comments, p. 11.)

As to the first point, the applicability of the "substantial cause" test here was specifically confirmed in the discussion at pages 17-20 of Apollo's September 15 Opposition, and will not be repeated here. It is worth noting, however, that the carrier's current expression of the matter -- that the substantial cause test has "never" been applied "to contractual relationships" -- is simply blurring hyperbole. Precedents applying the substantial cause test involved revisions to tariffs initially formulated pursuant to carrier/customer contracts, and which tariff revisions were being challenged as inconsistent with the terms of the parties' underlying agreement. That "contractual relationships" were involved where the substantial cause test was applied is beyond serious dispute. (See also Apollo Opposition, nn. 15, 17, and accompanying text.)

Concerning the carrier's claim that the legal requirement to file tariffs, without more, somehow moots the need for a sub-

stantial cause showing here, pages 21-22 of Apollo's Opposition specifically settled that matter. As there summarized (id.):

> First, there was no Commission directive to file either Transmittal Nos. 873 or 874. Second, even if there were an external requirement that GTE Telephone file some form of tariff, the specific contents of such a filing -- including those portions which alter the Apollo/GTE long-term arrangements -- were a discretionary matter with the carrier. Third, whether Transmittal No. 873 was compelled or not, it must still meet the statutory "just and reasonable" standard, and is subject to the Commission's requirement, in making that evaluation, of the "aid" of a "substantial cause" showing. [Footnote omitted.]

The carrier's presentation here adds nothing new.

C. The Absence of Any Defensible Justification for Abrogating the Maintenance Agreement Remains Clear

In it Comments (p. 21), GTE Telephone concedes that it had "contracted maintenance work to Apollo and paid Apollo for its services." The carrier also agrees that "the term of the Maintenance Agreement was for five years and would have expired in May, 1996."[4/] Its justification here for attempting to abort the Maintenance Agreement by tariff is as cryptic as its earlier statements on the subject:

> Abrogation of the Maintenance Agreement on July 18, 1994 was required to bring GTECA and Apollo into compliance with the Act and the Commission's Rules. GTECA had no choice but to supplant the Maintenance Agreement upon the expiration of the waiver. E.g., 47 C.F.R. §63.54(c). Therefore, this agreement has been voided by operation of law.[5/]

[4/] Id. GTE Telephone is correct in this regard; Apollo's Opposition (p. 22) incorrectly characterized the Maintenance Agreement as terminating in May of 1995.

[5/] GTE Comments, p. 21. Elsewhere, and similarly without explanation or support, the carrier declares that "some of the operational characteristics of the Cerritos video network have been necessarily

[Continued on next page]

GTE Telephone's summary declaration is neither adequate nor accurate. The only support cited, Section 63.54(c) of the Commission's Rules, does not compel the course GTE Telephone chose. (See, e.g., Apollo Opposition, fn. 20.) Indeed, in its own Direct Case (pp. 16-18), the carrier strenuously argued that Section 63.54 does not require termination of such arrangements! There is, in short, no adequate justification for the carrier's voluntary abrogation of the Maintenance Agreement.[6/]

II. GTE Telephone's Factual Assertions Concerning Apollo's Right To Use Of The GTE Bandwidth Are Without Merit

From the outset, Apollo has explained the parties understanding while GTE Service would use half of the Cerritos system bandwidth in the early stages of system operation for experimentation, Apollo would have a right to accede to the use of that bandwidth thereafter at a price to be determined. Apollo has

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[Continued from previous page]

Apparently confident that declaring it so makes it true, the carrier provides no support whatever for its assertion. In fact, there is no statute, rule or precedent which "necessarily" requires abrogation of the Maintenance Agreement.

[6/] With characteristic word-play, GTE Telephone notes that its voiding of the Maintenance Agreement was consistent with its "pre-existing responsibilities" (GTE Comments, p. 21) referring to its earlier observation that "[a]s owner of the network, GTECA has always been ultimately responsible for maintenance responsibilities" (GTE Comments, p. 20). Whatever any of that may mean, as "owner of the network," the carrier lawfully contracted with Apollo to perform maintenance functions, and its unchanged "owner" status does not vest it with lawful discretion to abort that contract at will, by tariff or otherwise.

further explained that the parties began the process of implementing that transition in Summer of 1993, that GTE Telephone aborted that process after the U.S. District Court in Virginia declared the Commission's cross-ownership Rules unconstitutional, and that Apollo was forced to file a civil suit in 1994, in an effort to enforce its contract rights. In this proceeding, Apollo has argued that the proposed tariffs effectively extinguish Apollo's contract rights to the remainder of the Cerritos system bandwidth -- indeed, threaten to extinguish Apollo's ability to seek judicial enforcement of those rights -- by limiting Apollo to use of its current bandwidth, while perpetuating GTE Service as an occupant of the remaining system bandwidth.

A. The parties' understandings were not as represented in the carrier's Comments

In its Comments (pp. 14-19), GTE Telephone launches an all-out effort to discredit the idea that Apollo ever had any such right.[7/] The carrier first seeks to create the impression that the parties did not contemplate that Apollo would accede to the use of the frequencies after a limited period of GTE experimentation. (GTE Comments, pp. 14-15.) Consistent with that view, the carrier asserts, "Apollo was always well aware that GTECA had entered into coordinate fifteen year agreements with [Apollo] and [GTE] Service." (GTE Comments, p. 14.)

[7/] In light of the carrier's pleading hyperbole, it should be made clear that Apollo has no designs to steal the frequencies involved -- it does not seek to "dispossess" GTE Service, or to "wrench" its channels away. (See GTE Comments, p. 18.) Apollo has sought only to avail itself of its contract right to use that bandwidth at a "reasonable market rent" under the Lease Agreement.

In fact, while GTE Telephone had told Apollo in the 1980's that it had entered into an agreement with GTE Service, the carrier specifically declined an Apollo request for a copy of that agreement,[8] and none of Apollo's principals or counsel ever saw the document, if it exists. In fact, Apollo was told that the GTE Telephone/GTE Service agreement tracked the GTE Telephone/Apollo agreement, but principally to make sure there were no FCC problems. And in fact, Apollo was repeatedly advised during 1988-1993, by both GTE Telephone and GTE Service personnel, that GTE Service "experimentation" would not extend beyond the five-year period.[9] Indeed, Apollo was privy to carrier discussions of how GTE Service payments could be accelerated in order to permit full recovery by the end of the five-year experimental period.

Apollo is prepared to produce sworn testimony to support these facts, and to identify for cross-examination current and

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[8] Apollo's request was made of GTE's Lloyd Carter and James King at a meeting held August 24, 1989 in San Luis Obispo, California.

[9] In addition to numerous oral conversations in that regard from the outset of contract arrangements with GTE Telephone and GTE Service, later correspondence memorializes the parties' understandings and expectations. In addition to GTE's June 29, 1993 letter (quoted at pages 3-4 of Apollo's Brief) -- which specifically announced the conclusion of GTE's tests and the "availability" of the GTE bandwidth to Apollo -- GTE later emphasized its commitment

> . . . to work closely with Apollo to ensure that the transition in Cerritos from test bed to purely commercial cable service has no adverse impact on the City of Cerritos and its cable subscribers. The first step in that transition is Apollo's action on its right of first refusal to use the bandwidth capacity currently reserved to [GTE Service's] experimental uses.

Letter to Ronald Wyse, Esq., from Marceil Morrell, Esq., GTE Telephone Operations, dated July 23, 1993, pp. 3-4.

former GTE personnel with personal knowledge of these matters. That GTE Telephone continues to file pleading assertions so plainly contrary to the carrier's earlier, publicly expressed views is regrettable in the extreme.

B. The contract terms do not support GTE Telephone's position

GTE Telephone next argues that the contract wording "confirms" that the parties had no expectation that Apollo would accede to the use of GTE Service's system channels. (GTE Complaint, pp. 15-16.) The history and content of the parties' agreements, however, belie the carrier's contention.

All of the contracts were designed to limit GTE Service's use of the system to non-commercial experimentation, and to avoid any adverse impact on Apollo's commercial cable services in Cerritos. Thus, the 1987 Lease Agreement (¶ 18) acknowledged that GTE Service would "be using a portion of the System for the purpose of testing new communications technologies"; and GTE Telephone would permit even that usage only if Apollo received "adequate assurances from GTE Service" that Apollo's services would "not be disrupted thereby" (id.). The 1989 Amendment to the Lease Agreement likewise reflected GTE Service's having leased bandwidth "for testing technology and services in the City" (¶ D), and that "the testing of new communications technologies" was "not intended to change Apollo's control over, or essential economic expectations of, its provision of" cable television services in Cerritos (¶ F).

In addition, of course, both GTE Telephone and GTE Service had agreed not to compete with Apollo's commercial cable services in Cerritos.[10/] And in a June, 1993, Amendment to the Service Agreement between Apollo and GTE Service (Attachment 1 hereto), certain financial concessions to Apollo were required to be taken advantage of by December 31, 1993, because "although [GTE Service] plan[s] to wrap up testing in 1993, the FCC waiver extends into 1994 and [GTE Service] want[s] to be covered in the event it takes a month or so longer to wrap things up."[11/]

Apollo submits that none of these contract undertakings or expressions is compatible with the idea of an "indefinite" -- and potentially commercial -- offering of cable service in Cerritos by GTE Service.

C. GTE Telephone's analysis of common-law contract rights is contrived and deficient

By resort to hornbook notions of offer and acceptance, GTE Telephone attempts to demonstrate that, as a matter of California law, Apollo has no enforceable contract right to the GTE Service bandwidth. That discussion, however, is a pure non sequitur.

It should be stressed preliminarily that this is not the appropriate forum in which to address or resolve common-law contract rights. "[A]s a matter of longstanding policy, the

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[10/] Lease Agreement, Amendment No. 2, ¶ 7 (Apollo Brief, Att. 10); Enhanced Capability Decoder (Converter Box) Agreement, ¶ 2(d) (Apollo Brief, Att. 14).

[11/] Letter to Ronald Wyse, Esq. from Connie E. Nicholas, Esq., GTE Telephone Operations, dated March 29, 1993, pp. 1-2. See also n.9, supra.

Commission does not assume jurisdiction in contractual controversies . . . , recognizing that such matters are better left to local courts for resolution."[12/] Apollo will not here argue the merits of its pending state civil suit.

It is worth briefly making clear, however, that GTE Telephone's legal analysis is far wide of the mark. Contract wording for typical contract rights of first refusal customarily provides that if a seller (A) receives an offer from a prospective buyer (B), A is obliged to transmit the specific terms of B's offer to the rights holder (C). Within a prescribed period of time, C may agree to the same terms and "take" the deal; if C fails to do so, A may proceed to accept B's offer. Those were the types of provisions involved in the cases GTE Telephone cites.

The Apollo/GTE Telephone provision is conspicuously different. In the initial 1987 Lease Agreement provision (¶ 21), GTE Telephone agreed that if the GTE Service bandwidth "should become available," Apollo was granted a right "to the use of" that bandwidth on "such terms and subject to such provisions as are mutually agreed to by the parties."[13/] As part of the 1989

[12/] Letter to Colby M. May, Esq., from Larry D. Eads, Chief, Audio Services Division, FCC Mass Media Bureau, dated August 15, 1991 (citing John R. Kingsburg, 71 F.C.C.2d 1173 (1979); John F. Runner, 36 R.R.2d 773, 776 (1976); and Transcontinental Television Corp., 21 R.R.2d 945 (1961)).

[13/] Paragraph 21 of the 1987 Lease Agreement reads, in its entirety:

> Increase in Bandwidth Capacity. Owner agrees that if bandwidth capacity in excess of 275 Mhz should become available, Lessee, or its successor, is hereby granted a right of first refusal to the use of any such increase in capacity at such terms and subject to such provisions as are mutually agreed to by the parties.

revisions to a series of the parties' contracts, the Lease Agreement wording was made somewhat more specific. Instead of a right to use the bandwidth on terms and conditions to be agreed on in the future, the bandwidth was to be made available "at the then reasonable market rent for such bandwidth."[14/]

[14/] The pertinent portions of the 1989 Amendment No. 2 to the Lease Agreement were as follows (¶ 8):

> (a) [GTE Telephone] agrees that if bandwidth capacity in the Coaxial facilities in excess of 275 Mhz should become available, [Apollo], or its successor, is hereby granted a right of first refusal to the use of any such increase in capacity at the then reasonable market rent for such bandwidth.
>
> * * * *
>
> (d) [GTE Telephone] agrees not to lease any portion of the System for the purpose of providing Video Programming to another party at a rental rate that is less than the reasonable market rent offered by [GTE Telephone] to [Apollo] pursuant to the rights of first refusal specified in subparagraphs (a) and (b) of this paragraph 21.

Amendment 2 of the Lease Agreement similarly provided (¶ 8):

> (b) [GTE Telephone] further agrees that if bandwidth capacity in its Fiber Network Facilities . . . (I) is available for the commercial -- as opposed to the initially experimental -- provision of Video Programming in the City; and, (ii) such capacity is offered by Owner to any other party for the purpose of commercially providing Video Programming; then in such event, [Apollo], or its successor, is hereby granted a right of first refusal to the partial use of any such portion of the Fiber Network Facilities that is available for the provision of Video Programming at the then reasonable market rent for such bandwidth. . . .
>
> (c) In the event [Apollo] switches all or a portion of its Video Programming to any of Owner's facilities other than the coaxial facilities, the parties agree to negotiate in good faith the rescheduling of the rent to be paid by [Apollo] for the initial term of the Lease based upon the essential business objectives and economic expectations of the parties . . . .

This is not, therefore, a classic "right of first refusal," as GTE Telephone's word-play suggests.[15/] This is a provision establishing that, when the bandwidth became "available," Apollo could exercise a right to its use, the only matter remaining to be determined being "the then reasonable market rent." Neither GTE Telephone nor Apollo was contractually entitled to prescribe what that figure would be. In the event of disagreement, customary and familiar mechanisms for having others intermediate that determination would be employed.

To the extent GTE Telephone here seeks to force this agreement provision into "offer" and "acceptance" terms, the correct expression would be that GTE Telephone "offered" Apollo the "availability" of the bandwidth, Apollo "accepted" that "availability"; the parties were then left to agree on the "reasonable market rent" figure. Apollo's refusal to accept GTE Telephone's exorbitant first estimate of that figure did not destroy Apollo's underlying "acceptance" of the bandwidth availability. It was simply a step in the process of arriving at the yet-unresolved "market rent" amount.[16/]

[15/] At one point, for example, the carrier explains that as a "right of first refusal," the Lease Agreement provision "simply permits Apollo to acquire Service Corp.'s channels before they are sold to someone else." (GTE Comments, p. 15; emphasis in original.) That pleading assertion, of course, belies GTE Telephone's own June 29, 1993 letter to Apollo, in which the carrier, "Pursuant to Paragraph 21 of the Lease Agreement," stated that "Apollo CableVision, Inc. Is hereby offered the right-of-first-refusal to use this capacity." No third party, or third-party offer, was involved.

[16/] GTE Telephone's reference to February 1994 correspondence from Apollo counsel Ronald Wyse to GTE's R. A. Cecil (Comments, p. 18) is without consequence here and, with all due deference, the characterizations in GTE counsel Raposa's March 1994 letter to Mr. Wyse are hardly dispositive. If "offer and acceptance" is the

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In fact, the parties' contract is directly analogous to agreements for the purchase of future goods or services, where the actual price to be paid is to be based on "fair market price" at the time of purchase. And it is axiomatic that the absence of initial agreement on the ultimate price to be paid does not vitiate the buyer's basic entitlement to obtain the goods or services:

> An agreement is not unenforceable for lack of definiteness of price or amount if the parties specify a practicable method by which the amount can be determined by the court without any new expression by the parties themselves. * * * If there is a 'market price' for the goods or services that are the subject of agreement, it is sufficient that the agreement is for payment at the market price.

Arthur L. Corbin, Corbin On Contracts, § 4.4 (Joseph M. Perillo ed., rev. ed., 1993). See also Samuel Williston, Williston On Contracts, § 41 (Walter H.E. Jaeger ed., 3rd ed., 1957).

Moreover, caselaw amply supports the notion that underlying rights to purchase are enforceable, even though the specific price to be paid -- be it "fair market price" or "then reasonable market rent" -- may not be immediately agreed on. See, e.g., Plateau Mining Co. v. Utah Div. Of State Lands, 802 P.2d 720 (Utah 1990) ("an agreement which sets a price that is determined by factors

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> proper framework, Mr. Wyse's October 18, 1993 letter was an "acceptance" of the "availability" of the bandwidth "offered" in GTE's June 29, 1993 letter, and only "reasonable market rent" was left for resolution. Mr. Wyse's February 28, 1994 letter is therefore irrelevant. At the same time, that letter correctly indicates that in making an agreement with a GTE Telephone-dictated lease charge of $95,000 a prerequisite to gaining use of the GTE Service bandwidth, GTE's June 29,1993 letter was not a correct expression of the rights conveyed in paragraph 21 of the Lease Agreement.

outside the contract, such as market price . . . is valid and enforceable"); Carver v. Teilsworth, 2 Cal.Rptr.2d 446 Cal. App. 4th Dist. 1991) ("[t]he law in California is clear that so long as the price may be objectively determined, a contract in which the price is not expressed nonetheless may be enforced"); Cobble Hill Nursing Home v. Henry & Warren, 548 N.Y.S.2d 920 (Ct.App. 1989) ("a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties"); Toys, Inc. v. F.M. Burlington Co., 582 A.2d 123 (Vt. 1990) (renewal option in a lease providing that fixed minimum rental would be renegotiated to then prevailing rate within a shopping mall, was sufficiently definite in its terms to be enforceable); Portnoy v. Brown, 243 A.2d 444 (Pa. 1968) ("where a contract specifies that the price is to be measured by the 'fair market value' or 'reasonable value' of the services or property involved, courts generally hold that the price is sufficiently certain in order to have an enforceable obligation"). See also, e.g., Vigano v. Wylain, Inc., 633 F.2d 522 (8th Cir. 1980); California Lettuce Growers v. Union Sugar Co., 289 P.2d 785 (Cal. 1955).

GTE Telephone having declared the GTE Service bandwidth "available" to Apollo in June 1993, and Apollo having later expressed its intention to take the bandwidth, the parties' obligation to effect the transition was fixed. All that remained was to finally ascertain "then reasonable market rent for such bandwidth." GTE Telephone's change of heart, and its withdrawal from the process of determining "the then reasonable market rent"